UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

THE ANTHEM, LLC

and

ROBERT RODRIGUEZ

and

LUIZ RAMPELOTTO

and

LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

CASES
2-CA-36229
2-CA-36284
2-CA-36322
2-CA-36622

Gregory B. Davis Esq., Counsel for the General Counsel
Jonathan D. Farrell Esq., Brian S. Conneely, Esq., and Alexander Leong, Esq., for the Respondent
Jessica A. Faige Esq., for the Charging Party

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. This case was tried in New York, New York on December 20, 21, 22, 2004 and January 4, 5, 6 and 11, 2005. The charge in 2-CA-36229 was filed by Luiz Rampelotto on April 30, 2004. The charge in 2-CA-36284 was filed by Robert Rodriguez on May 25, 2004. The charge and amended charges in 2-CA-36322 were filed by the Union on June 10, July 14 and July 28, 2004. The charge in 2-CA-36622 was filed by the Union on October 29, 2004.

A Consolidated Complaint was issued by the Regional Director of Region 2 on October 19, 2004. Thereafter, the Director issued Amended Consolidated Complaints on November 8, 2004 and December 8, 2004. The last Complaint, which consolidates all of the allegations, made the following contentions.

1. That on or about April 28, 2004, a petition in 2-UD-347 was filed with the Board seeking to remove the union shop authority of the existing collective bargaining representative, Local 670, Stationary Engineers, Firemen, Maintenance and Building Service Union, R.W.D.S.U.

2. That on or about April 30, 2004, the Respondent, by Paul Athens, interrogated employees about the filing of a petition with the NLRB. [1]

3. That on or about April 30, 2004, the Respondent, by Brendan Higgins, threatened employees with discharge.

4. That in May 2004, Local 32B conducted an organizing campaign amongst the employees of the Respondent.

5. That in or about May 2004, the Respondent, by Higgins, interrogated employees regarding their support for Local 32B.

6. That on May 24, 2004, the Respondent, for discriminatory reasons, discharged Robert Rodriquez.

7. That on or about June 3, 2004, the Respondent, for discriminatory reasons, discharged Fitim Gjaka, Naser Kanacevic, Mehmet Ozatalay, Arjenis Perez, Nefail Perovic, Luiz Rampelotto, Gilbert Rodriguez, Paul Rodriguez, Angel Vargas and Raisal Saien.

8. That on or about June 4, 2004, the Respondent, for discriminatory reasons, discharged Anthony Rodriguez.

9. That on or about June 9, 2004, the Respondent, by Athens, promised employees improved wages, medical and dental benefits.

10. That on or about June 23, 2004, the Respondent, by Higgins, interrogated employees about their union activities, created the impression of surveillance, and promised employees new medical benefits, increased wage rates and new dental benefits.

11. That in early July 2004, the Respondent implemented the improved medical and dental benefits and granted the wage increases promised on June 23.

12. That on or about October 22, 2004, the Respondent conditioned reemployment of Raisal Saien on his waiving his rights under the National Labor Relations Act.

13. That on or about October 28, 2004, the Respondent, by Athens told employees that it would be futile to select Local 32BJ as their representative.

On the entire record in this case including my observation of the demeanor of the witnesses and after reviewing the briefs filed by the parties, I hereby make the following:

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organizations within the meaning of Section 2(5) of the Act.

[1] The actual allegation was that the interrogation was in relation to a charge filed with the NLRB. I assume that this was an error.

II. The Alleged Unfair Labor Practices

The Anthem is a luxury rental building located at 222 East 34th Street in Manhattan. It is one of many apartment building buildings owned by the Respondent. This building has about 480 apartments, a fitness facility, a resident lounge, a roof top garden and a resident lounge. The rents are fairly pricey, starting at about $3,000 per month for a one-bedroom apartment.

The owners are Kamran and Scott Hakim. At the time of the hearing, the general counsel and chief of operations was Joseph Tuchman. The building's property manager was Paul Athens and the building superintendent was Brendan Higgins. Both Paul Athens and Brendan Higgins had replaced other people who were in place when the building opened in June 2003. [2]

The General Counsel offered evidence that in May 2003, when Danny Rivera, the former building superintendent was hired, he was told by the former building manager, Tammy Smith and by Tuchman, that Local 670, RDWSU, UFCW, AFL-CIO, CLC was going to be the union that the Respondent was going to recognize for the employees. Rivera, who was a member of Local 32BJ, testified that he asked about Local 32BJ and was told by Tuchman and Smith that they didn't want Local 32BJ anywhere near the building. This entire conversation, which was denied by Tuchman, occurred more than a year before the violations alleged in this case took place. Also, it took place outside the statutory 10(b) period and therefore cannot be alleged as a violation of the Act.

There was some evidence that in or about late May 2003, two Local 32BJ agents talked to a few of the employees in the lobby of the building. A former employee Joey Clewell testified that at about that time the former manager, Tammy Smith, saw some of the Local 32BJ authorization cards, tore them up and said that Local 32BJ was not an option. He alleges that she threatened employees with discharge if they tried to contact Local 32BJ. Again assuming that this evidence is true, (Smith did not testify), this transaction took place outside the 10(b) period and about a year before the events that gave rise to the unfair labor practice allegations in the present case. Also, by the time that those later events occurred, Smith had already been fired by the Respondent and replaced by Paul Athens.

On May 30, 2003, the employees, (almost all of whom had been recently hired), were called to a meeting with David Green and Cono D'Alora, two representatives from Local 670 who apparently had been invited to the building and who solicited the employees to join that union. When some employees asked about the difference between Local 670 and Local 32BJ, they were told that the contractual benefits and wage scales were basically the same. The employees signed cards for that organization and they also chose Joey Clewell to be their shop steward.

On June 13, 2003, the Respondent and Local 670 agreed to have a card check and on June 17, 2003, an arbitrator certified that Local 670 had obtained a majority. On June 27, 2003, Local 670 and the Employer entered into a contract covering the employees working at the building, including the building superintendent. (At that time, Danny Rivera).

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[2] The evidence shows that Higgins had the authority to effectively recommend hiring, firing and that he had the authority to direct the work of the handymen, porters, concierges and other employees who worked at the Anthem. There is no question but that he was a supervisor within the meaning of Section 2(11) of the Act.

An examination of this contract shows that it cannot be described as a "sweetheart" deal. The wage rates run from $17.50 per hour for porters, doormen and concierges, to $18.50 per hour for handymen. Additionally, it provides for significant hourly wage increases on June 23, 2004 and June 23, 2005. The contract required the Employer to make payments of $325 per month per employee into a health fund operated by Local 670. It also provided for payments on behalf of the employees into a Pension and an Annuity fund. The contract contained grievance/arbitration provisions that Local 670 invoked on more than a couple of occasions when employees complained of discipline or other treatment that they disliked.

Other than a one time appearance at the building in May 2003 and a couple of communications between employee Clewell and Douglas Major in January 2004, Local 32BJ representatives had no further connection to these employees until late May 2004. That is, although there was testimony that employees may have talked amongst themselves about the relative merits of Local 670 and Local 32BJ, the latter union made absolutely no efforts to organize these employees until after Local 670 decided to leave the scene.

In any event, once the contract between Local 670 and the Respondent was executed in June 2003, the employees operated under and were paid the wages and benefits of that contract. Also, as will be described below, Local 670 was active in processing grievances on behalf of the employees. The unit of employees covered by the contract included doormen, porters, concierges, maintenance men and the building superintendent.

In or about September 2003, some of the employees discussed amongst themselves complaints that they had about Local 670, particularly as regards their health insurance coverage. Joey Clewell, Local 670's shop steward began to solicit employees to sign a petition to remove Local 670. He testified that by late January or early February 2004, he had obtained signatures from about 21 employees and contacted Local 32BJ representative Douglas Major. According to Clewell, Major told him not to file a petition and that he would look into the situation. Nevertheless, Clewell did not receive any response from Major and he did not do anything with the petition. Also, Local 32BJ, perhaps because of the AFL-CIO's "no-raid" rules, did not make any effort to organize these employees. There is no evidence to suggest that management, other than Rivera, was aware of this activity by Clewell and other employees.

Clewell resigned from the Company on April 22, 2004 and his position as Local 670's shop steward was taken over by Luiz Rampelotto.

On or about April 26, 2004, Rampelotto visited the NLRB's offices and was apparently told that he could not file a decertification petition because the existing contract with Local 670 had a couple of years to run before expiring. He also seems to have been told that he could not file an unfair labor practice regarding the original recognition of Local 670 because that event occurred more than 6 months ago and therefore was barred by the statute of limitations. It seems that he was advised that the only thing he could do was to file a UD petition, which would call for an election to determine if the employees wanted to nullify the union security provisions of the existing contract. That is, if he was successful in such an election, the employees would not be required to pay union dues anymore.

Rampelotto gathered signatures from 22 of his co-workers and filed a petition in Case No. 2-UD-347 on April 28, 2004. This petition was signed by him and was served on the Company the following day.

Rampelotto testified that on April 30, 2004, he was asked by Paul Athens, in the presence of Higgins, what the papers were that the Company had received from the Labor

Board. According to Rampelotto, he explained that the men were not satisfied with Local 670 and wanted to get somebody else. According to Rampelotto, Higgins told him that he thought that under the terms of contract, the employees were required to remain members of Local 670 in order to work at the Company. Rampelotto testified that Higgins stated, "We're not going to do anything to you guys right now, but as soon as this is over, you guys are all going."

Although the General Counsel alleges that the Employer engaged in unlawful interrogation during this transaction, I think this is a stretch. Having received the deauthorization petition that was signed by Rampelotto, it would be quite normal and reasonable for Athens and Higgins to inquire from the signatory what it was all about. And as to the alleged threat of discharge, I don't believe Rampelotto and credit Higgins's denial. To the extent that Higgins made any statement at all, it looks to me like he merely asked Rampelotto how their employment would be affected if they stopped paying dues inasmuch as the contract requires membership. According to Higgins, Rampelotto said that he would take care of it.

On or about May 25, 2004, Rampelotto and another employees, Robert Rodriguez, went to the offices of Local 670 to discuss a grievance that Rodriguez had previously filed and another one that he was about to file. They testified that during the conversation, they were told that Local 670 was thinking about giving up the shop because it was costing them too much money in legal expenses. After this meeting, they went to Local 32BJ, which then agreed to organize the employees.

Rampelotto testified that he began soliciting employees to sign Local 32BJ authorization cards. It is not clear to me exactly when these cards were solicited because although one signed by Arjenis Perez is dated May 12, 2004, the others offered into evidence were dated from May 26 to June 4, 2004. In this regard, Rampelotto testified that he obtained the unsigned cards from Local 32BJ for distribution *after* the meeting where Local 670 stated that they might drop the shop.

In any event, Rampelotto testified that on May 26, 2004, when he solicited a Local 32BJ card from an employee named Fitim Gjaka, Higgins approached and asked what it was. Rampelotto states that Gjaka said that it was a union card and that Higgins observed that it was from Local 32BJ. Higgins basically agrees with this, but says that he did not mention this to anyone else in management.

On June 2, 2004, the Company received a written disclaimer of interest signed by Local 670's attorney. With the exception of Luiz Rodriguez, who had been fired on May 24, 2004, the other alleged discriminatees were discharged on June 3 and 4, 2004.

On June 4, 2004, the Respondent contacted some of the employees who had been fired on June 3 and told them that they could return to work on Monday, June 6.

On June 7, 2004, Local 32BJ engaged in leafleting activity outside the building.[3] And on June 8, 2004, Local 32BJ faxed a letter to the employer expressing its intent to organize the employees and asking for a card check. The Respondent's position in this case is that until June 8, it had no knowledge either that Local 32BJ was organizing its employees or that its employees were interested in changing from Local 670 to Local 32BJ. The Respondent argues that even if Higgins witnessed Rampelotto handing a Local 32BJ card to one employee on May 26, this was a trivial incident that Higgins did not report it to his superiors. They also contend

[3] It also used one of those inflated rats that are much beloved in New York.

that Higgins had nothing to do with the decision to discharge the employees. [4]

During the time that employees expressed to each other their dissatisfaction with Local 670, the Employer was also expressing its dissatisfaction with the work being done by its employees. Running parallel to the facts described above, there is a second story, this one relating to the operation of the building from June 2003 to June 2004.

The evidence shows that almost from the beginning, the Employer's management became dissatisfied with the performance of the crew. At least two employees were discharged in 2003, these being Floyd Ellis and Robert Hamann. These people were not alleged to be discriminatees in this case.

The Employer's witnesses testified that the appearance of the building was dirty and that the performance of many of the employees was lackadaisical at best. They testified that since they were intent on running a luxury operation commanding high rents, this type of performance was not acceptable for this type of building. In addition, the Respondent called representatives from Local 670 who testified that almost from the beginning of their relationship with the Company, the Employer raised complaints about the employees' work performance.

According to Tuchman, when the problems with the work force did not abate, he decided to terminate Tammy Smith because he felt that she and building Superintendent Rivera were at odds. Smith was discharged in early January 2004 and replaced, after a hiatus, by Paul Athens on March 15, 2004. (Athens had previously been assigned to sales).

Also, Rivera had his probationary period extended with the hopes, according to Tuchman, that he would be able to turn the workforce around. Nevertheless, Rivera was ultimately fired and replaced in April 2004 by Brendan Higgins who had prior experience as a superintendent at a luxury building. [5] According to Athens, the problem with Rivera was that he protected a group of employees who were his friends and who were not doing their jobs. This was also testified to by Naser Kanacevic, an employee called as a witness by the Respondent and who stated that this clique consisted of Rivera, Joe Clewell, Robert Rodriguez, Anthony Rodriguez, Paul Rodriguez, Angel Vargas and Arjenis Perez. It is somewhat noteworthy that Kanacevic signed a card for Local 32BJ and is alleged in the Complaint as having been unlawfully fired on June 3, 2004.

Apart from the somewhat generalized assertions by the Respondent regarding the work performance of these employees, there also was evidence of specific transactions.

Angel Vargas was hired in September 2003 and was given a final warning in November 2003 for absences and lateness. The Respondent asserts that he did not improve much. In May 2004, Vargas was changed to the afternoon shift because, according to Athens, Vargas had said it was difficult for him to arrive to work on time. He also was reassigned from being a porter to being a doorman. Thereafter, he was put back to his job as a porter. Vargas did not testify in this case and did not refute the Company's accusations that he constantly gave excuses for arriving late and for not being at his post.

In December 2003, Paul Rodriguez, a porter, received a final warning for sleeping while

[4] I also note that even if the prior building superintendent, Rivera, was aware that there was some talk among the employees about Local 32BJ, that talk never went anywhere while he was still employed.

[5] Local 670 filed for arbitration regarding Rivera's discharge.

on the job. Thereafter, in February 2004, Rodriguez along with two other employees, were given warnings for spending an inordinate amount of time in the locker room watching videos. The testimony of Higgins and Athens was that they often observed Paul Rodriguez in the wrong place at the wrong time. They also testified that he was often late to work.

On March 2, 2004, the Respondent issued a five day suspension to Robert Rodriguez who was the night shift concierge. This resulted from an incident between Rodriguez and another employee Phillip Gega that occurred when Gega reported to work on February 25, 2004. Rodriguez and Gega both testified about the confrontation that took place in the lobby and each blamed the other. But there is no question, after looking at a video of the incident, (even without an audio track), that Rodriguez was the aggressor. On February 26, 2004, the video tapes were reviewed and the Company's management determined that Rodriguez was the aggressor and wanted to fire him. Nevertheless, representatives from Local 670 took the position that the conduct was not sufficiently egregious to warrant a discharge. The Company decided to issue a five day suspension instead of a discharge. Local 670 filed a grievance on Rodriguez's behalf on March 16 and later negotiated a settlement whereby he was paid for the days he lost. When this settlement was presented to Rodriguez on May 24, 2004, he rejected it and stated to Athens that he was going to seek arbitration.

On March 10, 2004, the Company distributed a memo to the employees reminding them that they could not release keys to any unauthorized persons and that an infraction of this would result in a five day suspension. [6] On April 4, 2004, Anthony Rodriguez, the son of Robert Rodriguez, was at the front desk and gave the keys to apartment 823 to an unauthorized person. The tenant expressed her extreme displeasure to the Respondent and as a consequence, Anthony Rodriguez was given a one day suspension on April 18, 2004. Anthony Rodriguez filed a grievance and Local 670 subsequently filed for arbitration on May 5, 2004.

Luiz Rampelotto testified that in April 2004, Superintendent Higgins, on several occasions, called him incompetent and threatened to fire him. (This is before any organizing activity by Local 32BJ). Higgins testified that Rampelotto wasn't washing the floors properly and wasn't vacuuming correctly.

The Respondent introduced evidence to the effect that Gilberto Rodriguez was an incompetent employee who was moved from one assignment to another in an effort to find something that he was good at. At one point, the Company changed his work schedule from the day shift to the afternoon shift and changed his days off. When Gilberto Rodriguez complained of this shift, Local 670 filed for arbitration on his behalf on April 28, 2004.

On May 12, 2004, Brian Welsh was discharged for absenteeism. The General Counsel does not allege that the Respondent violated the Act by virtue of this discharge.

On May 15, 2004, Athens discovered that Robert Rodriguez was not at his post. And when he pulled surveillance tapes these showed that during the period from May 10 to May 13, 2004, Rodriguez watched DVDs at the front desk, was out of uniform and was frequently away from his post. Athens decided to fire Rodriguez.

On or about May 22, 2004, representatives of Local 670 met with the Company. Local 670 representative, Green, testified that he had been receiving constant complaints from the Company and the employees about each other. Local 670's attorney, LaRuffa, testified that by

[6] This memo was issued because an employee had recently given a person the keys to the wrong apartment.

this time, the situation at the Company was extremely bad and that the Company and the work force were "at war." The testimony was that at this meeting, the parties talked about certain complaints that employees had about the health insurance benefits and about the pending grievances. With respect to the Robert Rodriguez grievance, the Company's witnesses stated that they had decided by the time of this meeting to discharge him. Nevertheless it seems that at this meeting, the Company agreed to resolve his pending grievance by paying him for the 5 days but keeping his warning on record. Also, the Company agreed to retract the one day suspension given to Anthony Rodriguez but insisted on keeping his warning on file. Finally with respect to Gilbert Rodriguez, the Company agreed to put him back to a Monday to Friday shift but insisted that he would remain on the afternoon shift and would not be assigned to work in the lobby.

Also discussed at the meeting was the general conditions and general work performance at the building. Green testified that although the Company stated that certain of the workers should be fired, he opposed this. The Union's position was that the Company was not sufficiently documenting misconduct and was not correctly applying a progressive disciplinary system. LaRuffa testified that the Company's representatives said that had it not been for Local 670's processing of grievances, it would have gotten rid of these guys.[7] It was agreed that Green, on behalf of Local 670 and Athens, on behalf of the Company, would meet with the employees on June 4, 2004 to discuss the problems at the building and attempt to clear the air.

At about midnight and after the conclusion of the May 22 meeting, Athens gave Robert Rodriguez a letter explaining that he would be paid for the days lost as a result of his five day suspension. Rodriguez told Athens that he wanted the suspension expunged and Athens refused. Rodriguez then stated that he would proceed to arbitration. (I expect that Rodriguez wanted the suspension expunged because he knew it made him vulnerable to discharge if he was involved in another incident).

During the evening shift on the evening of May 24/25, 2004, Athens discharged Robert Rodriguez based on the prior suspension and also his actions viewed on the video tapes of May 10 to 13, 2004.

Robert Rodriguez went to Local 670's office with Rampelotto on May 25, 2004 in order to file another grievance regarding his discharge and to request that his earlier grievance be taken to arbitration. As noted previously, he and Rampelotto were told at this time that Local 670 was thinking about dropping the shop because the legal expenses were getting to high. (No doubt, the Union was also motivated by the fact that a deauthorization petition had been filed by its shop steward, seeking to nullify the contractual requirement that employees pay union dues). Also, as noted above, it was after this meeting that Rampelotto contacted Local 32BJ for the purpose of organizing the shop.

The Company received Local 670's disclaimer on June 2, 2004. Tuchman testified that this came as a complete surprise to him and that it required the Company to make some quick decisions. First, the June 4 meetings were called off. Second, since the disclaimer meant that the existing collective bargaining agreement was no longer in effect, the Company had to decide

[7] Higgins testified that when he took over as the building superintendent and saw the state of the employee's performance, he asked Athens why these people had not been fired. He testified that Athens told him that he was constrained by the collective bargaining agreement with Local 670. (As noted above, Local 670 had been diligent in processing grievances and filing arbitration cases).

what to do about pay and benefits. And third, according to Tuchman, he and Athens decided that since there no longer was any contractual constraint on their ability to fire employees, this would be the perfect opportunity to clean house and get rid of a large number of employees who, in their opinion, were not performing well. According to Tuchman, he told Athens to get rid of any employees who were problems and that he gave Athens carte blanche to decide who should go.

With respect to the discharges, Higgins credibly testified that he did not have any input in the decision to discharge the employees. Higgins testified that when Athens told him the names of the people who were going to be discharged, he replied that although he agreed on most of the names, he didn't agree as to three or four of the people. (Nefail Perovic, Arjenis Perez, Leonardo Jaramillo and another employee whom he called Tim). According to Higgins, Athens said that the decision had already been made.

On June 3, 2004, the Respondent discharged Gilbert Rodriguez, Paul Rodriguez, Angel Vargas, Anthony Rodriguez, Fitim Gjaka, Naser Kanacevic, Mehmet Ozatalay, Arjenis Perez, Nefail Perovic and Leonardo Jaramillo. Raisal Saien and Luiz Rampelotto were told of their discharges on the following day.

In connection with this group of discharges, the Respondent's witnesses testified that through the chauffeur of the owner, it assembled a group of replacements to start work on June 4, 2004. However, as many of these people were Turkish and did not speak English, the Respondent decided to offer reinstatement to some, but not all of the people who had been fired on June 3 and 4. Accordingly, on June 4 at about 4 p.m., Athens phoned Arjenis Perez and told him that he was sorry and wanted him to return to work. Perez agreed and returned to his job on Monday June 7, 2004. Athens also phoned Fitim Gjaka on the same date and Gjaka accepted the offer of reinstatement and returned on Sunday, June 6. During the week commencing on June 7, 2004, Athens offered reinstatement to Naser Kanacevic, Mehmet Ozatalay and Nefail Perovic, all of whom returned to work. Robert Rodriguez, who had been fired earlier, along with Gilberto Rodriguez, Paul Rodriguez, Angel Vargas, Anthony Rodriguez, Raisal Saien and Luiz Rampelotto were not offered reinstatement. In the case of Saien, he was offered a job later on and his situation will be dealt with later on in the Decision.

As noted above, Local 32BJ engaged in some leafleting activity on June 7 and sent a fax to the Employer on June 8, 2004.

On June 9, 2004, Athens distributed a memorandum to the employees stating that their wages would be increased by $.55 per hour at the end of June 2004. The memorandum also stated that the Company was in the process of obtaining a new health insurance policy for the employees.

On June 14, 2004, the Respondent held a meeting with the employees where it notified them that it had obtained from United Healthcare a new health insurance policy for them. At the meeting this plan was described by a representative of United Healthcare and when employees asked about dental benefits, (which they did not have under the previous Local 670 welfare plan), Athens told them that the Company would provide such benefits to them. The dental benefits were in fact, given in early August 2004. And the wage increases were given at the end of June 2004 as promised.

With respect to the wage increases and the health insurance benefits, the Respondent points out that these were not new benefits but rather benefits that the employees already had or were planned under the contract with Local 670. (The employees were supposed to get these

raises as of June 23, 2004 and they were covered by employer paid medical benefits through Local 670s welfare plan). Because Local 670 disclaimed its interest in representing these employees, the collective bargaining agreement no longer was in effect and the Employer did not want to eliminate existing benefits or wage increases that had already been promised and planned for.

Benefits granted upon the advent of a union organizing campaign, (assuming the Employer is aware of it), creates a presumption that they are granted to influence employees to withhold their support for unionization. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439, 443 (1990). To rebut this presumption, the Employer must establish a legitimate explanation for the timing of the grant of benefits and this usually consists of evidence that they were part of an existing practice or that they were planned beforehand. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (l963); *Baltimore Catering Co*., 148 NLRB 970 (l964). Indeed, an employer can neither grant nor withhold existing benefits upon the advent of union organizing without facing the presumption that it has violated the Act. This is because, an employer faced with an union organizing campaign is required to maintain the status quo ante.

In the present case, I cannot conclude that the granting of the wage increases in June 2004 constituted a violation of the Act inasmuch as this was a wage increase that had already been planned and was already expected by the employees. With respect to the medical insurance benefits, this too was simply a substitution of a new plan for the Local 670 Welfare plan, in which, because of the disclaimer, the employees would no longer be eligible to participate. [8] The employees' existing conditions of employment included health insurance. And since they no longer would be getting that benefit pursuant to the contract with Local 670, the Employer had, at the least, a moral obligation to continue their health insurance benefits by obtaining and providing a roughly equivalent plan.

The Dental Plan is however, another matter. Under the old contract with Local 670, the employees did not have coverage for dental procedures. This therefore was a new benefit. And since this new benefit was given to the employees only after Local 32BJ put the Employer on notice that it was engaged in organizing activities, there is a presumption, not rebutted by the evidence in this case, that the granting of this particular benefit was designed to influence employees regarding their membership or support for Local 32BJ. In this respect, I shall conclude that the Respondent violated Section 8(a)(1) of the Act.

In late June 2004, the Company hired a labor consultant to talk to the employees. The evidence in this regard, including the testimony of the General Counsel's witnesses, shows that this person made no statements that could even arguably be construed as prohibited by the Act. In effect, he merely told employees that notwithstanding the fact that they signed cards for Local 32BJ, they nevertheless had the right to choose for themselves whether or not to join or vote for a union.

After the meeting ended, Higgins asked employee Gjaka to go and get a leaflet that was being distributed outside the building by Local 32BJ. After Gjaka returned, he handed a leaflet to Higgins who asked him who the Local 32BJ organizer was. Gjaka told him that she was Sarah [Leberstein]. Based on this transaction, the General Counsel contends that the Respondent violated the Act by interrogating Gjaka and engaging in unlawful surveillance. Both

[8] Pursuant to Section 302 of the Act, an Employer cannot make payments to a union, including payments to a union operated welfare fund, unless there exists a collective bargaining relationship with that union.

of these contentions are, in my opinion, without merit and are rejected. The Union was engaged in public activity right outside the premises of the building and I see nothing coercive in the fact that Higgins asked one of the employees to bring him a leaflet that was being distributed to the public and asking who the union organizer was.

The General Counsel also alleges that the Respondent constructively discharged Raisal Saien by conditioning his reemployment on the waiver of his statutory rights. I don't agree.

On October 10, 2004, Saien spoke to Athens who told him that he had an opening for a part-time painter. Saien accepted the job offer and Athens said that he would let him know when to start.

On October 22, 2004, Athens asked Saien to sign an employment agreement whereby Saien was to work 20 hours per week for a guaranteed period of four months at the rate of $18.05 per hour. In addition, Athens asked Saien to sign a "settlement agreement." This second document, which Saien may or may not have understood, stated:

> I, Raisal Saien wish to be excluded from cases 2-CA-36229, 2-CA-36284, 2-CA-36322 held before the National Labor Relations Board. A settlement has been reached between myself and The Anthem LLC, and I hereby fully release The Anthem from any allegation of violation of the National labor Relations Act, including but not limited to allegation that my June 3rd termination was the result of my engagement in protected and union activity."

On October 28, 2004, Saien was given a copy of the "settlement" document and told Athens that he did not intend to waive his rights and that he would quit "under those terms."

On November 2, 2004, Saien told Athens that he was quitting. Saien wrote out a letter stating that he was quitting because Athens had told him that he could not work unless he excluded himself from the unfair labor practice case before the Board. Upon reading the letter, Athens told Saien that this was not so and that Saien could continue to work. Notwithstanding after Athens requested Saien to continue on the job, Saien left.

Notwithstanding the fact that Athens asked Saien to sign a document whereby Saien purported to withdraw himself from the pending NLRB cases, the evidence does not show, and Saien's testimony does not support, any contention that Athens made this a condition of Saien's continued reemployment. Moreover, when Saien objected to the "settlement" document, the credited testimony is that Athens told Saien that his objections would not impede his continued employment. Assuming that Saien was so concerned about the waiver, (which in any event would have no legal affect on the unfair labor practice cases), he could have continued to work and indicated orally or in writing that he was not waiving any rights.[9] In sum, I do not think that the General Counsel has proven that the Respondent constructively discharged Saien or otherwise violated the Act with respect to his reemployment in October 2004.

III. Analysis

I have already made certain conclusions that I will not repeat here. Nevertheless, the main issue in this case involves the discharge of about half of the Employer's work force on

[9] Subsequently, on December 6, 2004, the Respondent made an offer of employment to Saien who accepted a full time position as a painter/porter on December 13, 2004.

June 3 and 4, 2004, which the General Counsel contends were motivated by the Respondent's desire to discourage its employees from joining or supporting Local 32BJ.

But the fact is that the people who made the decision to discharge this group, (Tuchman and Athens), credibly denied that they were aware of any activity by Local 32BJ to organize the employees or of any activity by the employees to join Local 32BJ. In this regard, the evidence shows that at the most, Higgins saw an employee with a Local 32BJ authorization card on or about May 26, 2004 and did not mention it to his superiors. And to the extent that Rivera, the former building superintendent may have heard employees talking about the relative merits of Local 670 and Local 32BJ, this took place a long time before the discharges and there is no evidence that his superiors were aware of this talk.

Management was of course aware that the employees were dissatisfied with Local 670 as the Respondent received a deauthorization petition on April 28, 2004. But this does not mean that Respondent was, or should have been aware that the employees were seeking to switch their allegiance to Local 32BJ. In fact, the evidence shows that Local 32BJ, apart from a visit in May 2003, did not actively commence *any* organizational activity at this facility until after May 25 or 26, 2004. (That being after representatives of Local 670 told shop steward Rampelotto that they were thinking of dropping the shop). If receipt of the deauthorizaton petition gave Respondent notice that its employees were not happy with Local 670, that more than likely would have pleased the Company because that union was vigorously enforcing the contract and challenging the Company's efforts to impose discipline on employees.

Which brings us to the discharges. The evidence establishes to my satisfaction that for a protracted period of time, many of the employees were not doing their jobs properly. The evidence also convinces me that when efforts to change the supervisory structure, (by replacing Tammy Smith and Rivera), did not do the trick, the Company's management was faced with an unruly and unproductive crew of employees.

So why didn't the Company fire these employees before? In this regard, I credit the testimony of Tuchman and Athens to the effect that Local 670 filed grievances and arbitrations on many of the cases where the Company attempted to impose discipline by way of suspensions, warnings or changing an employee's shift. Their testimony was that they believed that the grievance/arbitration provisions of the contract made it difficult and expensive to discharge employees. And in this regard, the evidence shows that Local 670 did not shirk its duty of fair representation when it came to pursuing grievances and filing for arbitration.

It is abundantly clear to me that the discharge of Robert Rodriguez on May 24, 2004 and his prior suspension were warranted by his misconduct. The testimony of employee Gega, coupled with the videos, demonstrate his aggressive behavior to other employees and his failure to either consistently wear his uniform on the job or his ability to stay at his work station as required. I reject any contention that his suspension or discharge was motivated by any activity that he may have engaged in with respect to Local 32BJ, or any other activity that might be considered protected.

On June 2, 2004, the Respondent was notified by Local 670 that it was disclaiming its interest in representing the employees. As a practical matter this meant that Local 670 was, in effect, rescinding the existing contract along with the grievance/arbitration provisions. This therefore meant that the Company no longer was under any contractual constraints either in disciplining or discharging employees. And in my opinion this is what it did. I credit the testimony of Respondent's witnesses that removal of this constraint led them to decide to "clean house" by discharging the employees who had not been performing to their expectations. In my

opinion, this decision was taken not because the employees were trying to get another Union, (which management was not aware of), but because the disclaimer gave the Company the opportunity to do so.

Conclusions of Law

1. By granting dental benefits to its employees for the purpose of dissuading them from voting for or supporting Local 32BJ, Service Employees International Union, AFL-CIO, the Respondent has violated Section 8(a)(1) of the Act.

2. The Respondent has not violated the Act in any other manner as alleged in the Complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[10]

ORDER

The Respondent, The Anthem, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Granting benefits to its employees for the purpose of dissuading them from voting for or supporting Local 32BJ, Service Employees International Union, AFL-CIO or any other labor organization.

(b) In any like or related manner interfering with employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities at 222 East 34th Street, New York, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 15, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT grant benefits to our employees for the purpose of dissuading them from voting for or supporting Local 32BJ, Service Employees International Union, AFL-CIO or any other labor organization.

WE WILL NOT in any like or related manner interfering with employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

The Anthem LLC.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264 0346.